

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

836

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CARVIN CONTRACTORS, INC.

v.

ROBERT L. CUNNINGHAM, et al.

HOME FEDERAL SAVINGS AND LOAN
ASSOCIATION

Appellant

v.

NORTH RIVER INSURANCE COMPANY

Appellee

) United States Court of Appeals
for the District of Columbia Circuit

) FILED FEB 17 1971

) *Hannah J. Van Orden* 23, 895
CLERK

PETITION FOR REHEARING

The appellant, Home Federal, through its attorneys of record, David S. Scrivener and Robert T. Gaston, petitions this Court for rehearing and as its grounds therefor, states:

1. On February 3, 1971 this Court ruled in favor of the Appellee, North River, on the ground that it appeared from the insurance policy in question that the contractual period of limitation of one year (Appendix, p. 19, "Suit" Clause, lines 157-161) applies to the mortgagee as well as the insured.

2. Home Federal believes that a careful and considered examination of the policy can only lead to the conclusion that the "Suit" Clause does not apply to the mortgagee,

Home Federal.

3. The bases for Home Federal's position are:

a) All of the terms of the policy on page 19 of the Appendix concern the rights and obligations between the insurer and the insured, except for lines 68-85 entitled "Mortgagee interests and obligations". All of the mortgagee's obligations are spelled out in this paragraph with the closing statement that "other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing". The "Suit" Clause is not one that is "added", but rather is located on the same page.

b) As part of the "Dwelling and Contents Form", (Appendix, pages 20-21) a form which is added to the basic policy, there appears a "Mortgagee Clause" in which other provisions relating to the interests and obligations of the mortgagee are set forth. While this clause sets no limitation on suits filed by the mortgagee, it does involve many of the same topics (increase in hazard, cancellation, subrogation, etc.) discussed on page 19 of the appendix, indicating that page 19, including the "Suit" Clause, does not involve the mortgagee except where specifically entitled "Mortgagee interests and obligations".

c) Perhaps the most important basis for petitioner's argument is that the "Mortgagee interests and obligations" Clause, lines 74-78 in pertinent part states, "If the insured

fails to render proof of loss such Mortgagee ... shall be subject to the provisions hereof relating to ... time... of bringing suit". If the "Suit" Clause applied to the mortgagee, this statement in the "Mortgagee interests and obligations" clause would be entirely unnecessary, superfluous, and redundant. This statement makes it clear that the insurer in drafting the policy fully recognized and intended that the "Suit" Clause wasnot applicable to the mortgagee. If it were meant to be applicable to the mortgagee, there would have been no need to make it conditionally applicable to the mortgagee in the "Mortgagee interests and obligations" Clause. If this does not make it clear that the " Suit" Clause does not apply to the mortgagee, it must at least be said that an ambiguity exists. It is fundamental that ambiguities are to be interpreted against the party who wrote the contract, especially where that party seeks to defeat the operation of the contract.

Messina v. Mutual Benefit Health and Accident Association (1964)
228 F. Supp. 865, 121 U.S. App. D.C. 328, 350 F.2d 458, certiorari denied 383 U.S. 908; 17 Am. Jur. 2d, Contracts Sec. 276, p. 689.

4. While the "Mortgagee interests and obligations" Clause does make the mortgagee subject to the "Suit" Clause, in the event the insured fails to render proof of loss, there was no such failure in this case. North River has conceded

that it waived that requirement under the universal rule of law that an insured is not required to present a proof of loss as to a claim that has already been denied. Appellee's Brief, page 4.

WHEREFORE, Home Federal prays that the Court, upon rehearing, will vacate the Summary Judgment against it and remand the case for further proceedings at the trial level.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing was mailed, postage prepaid, this 17th day of February, 1971, to Denver H. Graham, Esq. and F. Wainwright Barnes, Esq., 1314 19th Street, N.W., Washington, D.C. 20036, attorneys for the appellee.

Robert T. Gaston
ROBERT T. GASTON